Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 302 of the	)	
Telecommunications Act of 1996	)	**CS Docket No. 96-46**
	)	
Open Video Systems	)	
	)	
and	)	
	)	
Telephone Company-Cable	)	
Television Cross-Ownership Rules,	)	**CC Docket No. 87-266**
Sections 63.54-63.58	)	

To: The Commission

COMMENTS OF THE COMMUNITY BROADCASTERS ASSOCIATION

1. The Community Broadcasters Association ("CBA")[1] hereby submits these Comments in response to the Commission's *Report and Order and Notice of Proposed Rule Making* in the above-captioned proceeding. In implementing rules to govern open video systems ("OVS"), CBA urges the Commission to adopt rules that will not only allow the marketplace to guide the growth of this new media, but will also protect the rights of existing local television broadcast stations, including low power television ("LPTV") stations, and ensure that those stations have reasonable access to OVS. Specific comments on how these goals should be implemented are set forth below.

[1] CBA is the trade association of the nation's low power television ("LPTV") stations. It conducts various activities on behalf of LPTV and represents the interests of the LPTV industry in public policy forums.

2. Carriage of Video Programmers. Section 653(b)(1)(A) of the Telecommunications Act of 1996 (the "1996 Act") prohibits OVS operators from discriminating among video programming providers with respect to carriage on its system, with some limited exceptions. Additionally, as the Commission notes, if demand for channel space exceeds the channel capacity of the system, OVS operators are not allowed to select video programming services for carriage on more than one-third of the activated channel capacity on their system.[2] Whether or not it opts adopts rules addressing detailed specific issues that may arise, the Commission should make it clear that no such discrimination may occur in two important respects: the allocation of capacity or channel positioning on the OVS. To allow such discrimination would force television broadcast stations, including LPTV, into an unreasonably insecure position and violates the statutory mandate against discriminatory behavior by OVS operators.

3. Notice. The Commission seeks comment on how an OVS operator should be required to notify video programming providers that it intends to establish an OVS. CBA supports the adoption of a rule that would require OVS operators to publish such intent in a regional or local newspaper covering the area in which the OVS will serve, similar to the manner in which broadcast stations currently give newspaper notice for applications filed at the FCC for renewal of license. The Commission's rules should also ensure that sufficient time is given for response to the publication notice by video programming providers. The notice should contain adequate information as to how the video programming providers should apply for the channel

[2] Section 653(b)(1)(B).

space, where to apply and to whom, and by what date such application should be sent. In other words, the notice should set forth enough detail to prevent a situation in which the programmer cannot reasonably gain access to the OVS because of a lack of clear and complete information in the very notice that is supposed to ensure such an opportunity for fair and reasonable access. A rule that ensures this result will lessen the administrative burdens of all parties concerned, including the Commission itself.

4. Capacity Measurement. CBA supports the Commission's adoption of a rule that allows an OVS operator to select the programming for one-third of its activated channel capacity, where the demand for the channels exceeds the supply, as long as truly fair and reasonable rates are charged for access to the other two-thirds of the system, and that access is granted on a nondiscriminatory basis. Additionally, consumers should be able to switch to all channels to the extent technically feasible at any time (i.e., from analog channels to digital and back again). Otherwise, many channels that cannot financially or for other reasons immediately convert to digital technology will be severely disadvantaged as the rest of the industry moves full speed ahead into the digital future without them. As many local community broadcast stations would probably make up a large portion of the then disadvantaged stations, the public interest would greatly suffer as a result of such an action.

5. Channel Positioning. While the Commission correctly notes that the lower numbered channels in an OVS will "likely contain the over-the-air broadcast signals,"[3] such positioning should be mandatory in order to avoid the repositioning of local broadcast stations,

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[3] *NPRM* at ¶22.

including LPTV stations, to create a competitive disadvantage against those stations in favor of others, especially those affiliated with the OVS operator. Toward that end, in an effort to prevent OVS operators from unfairly positioning only its affiliated programming in the lower numbered positions, the Commission should adopt a rule that requires OVS operators to position programming in a non-discriminatory manner, with broadcast stations placed on the channel over which they are ordinarily broadcast and not more than a fixed number (i.e., a percentage) of the total affiliated channels positioned below a certain lower numbered channel. Such rules would prevent discriminatory channel positioning by an OVS operator.

6. Allocation Procedures Where Demand Exceeds Capacity. If the Commission finds that it has the requisite authority to prescribe a specific method of allocating the remaining two-thirds of the OVS channel capacity, CBA urges the Commission to do so, instead of leaving that decision to the discretion of the OVS operator. Such broad discretion on such an important issue leaves much room for abuse by the operator to favor certain unaffiliated programmers over others, for whatever reason. However, the Commission should not adopt any method (e.g., first-come, first-serve or local bidding) that does not ensure or encourage carriage of diverse programming and local community broadcasting.

7. Operator's Ability to Market Channels It Did Not Select. OVS operators should not only be permitted to market to subscribers a service package that includes both the programming it selects and that which it does not select (either must-carry, PEG or other unaffiliated programming), but they should also be encouraged, if not required, to do so on a nondiscriminatory basis in an effort to avoid the subscriber confusion that will likely occur if each programmer is forced to market its own channel offering individually. In other words, in

order to ensure that the consumer has the opportunity to make an informed choice among all channels, affiliated or otherwise, an OVS operator must be required to market all unaffiliated, must-carry and PEG channel programming in the same manner in which the operator markets its affiliated channel programming.

8. Rates, Terms and Conditions of Carriage. In order to preserve access to the OVS by unaffiliated programmers, it is absolutely essential that the Commission clearly state that OVS operators may not charge unreasonable rates for access to their systems. Rates for access to the system should not discriminate, and thus, should be equal for *all* programmers. Rates for access should start at a low minimum level that programmers could then raise through an informal bidding process, with the channel going to the programmer who offered the OVS operator the most for the channel space. Such a rule would avoid the formula approach, which has proven problematic in the area of cable television leased access,[4] and would allow the market to drive the level of the rates for access to OVS, which is consistent with one of the stated purpose of the 1996 Act.

9. Whatever penalties the Commission deems appropriate for abuse of the rule should be sufficiently harsh to realistically deter the actions of an OVS operator who is tempted to overcharge unaffiliated programmers in an effort to acquire more channel space for affiliated programming under the guise of insufficient demand for channel space in the market. Further, it is vital that the burden be placed on the OVS operator, not on the individual programmer, to

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[4] The Commission is currently considering revising its cable leased access rules due in part to problems in implementing its current "highest implicit fee" formula approach. *See Order on Reconsideration and Further Notice of Proposed Rule Making*, MM Docket No. 92-266 and CS Docket No. 96-60, FCC 96-122, released March 29, 1996.

demonstrate that the rates charged for access are reasonable in the face of a complaint alleging otherwise. Such a rule would properly place the burden on the entity that can and should most reasonably bear it. In an OVS access rate dispute, the OVS operator will likely have greater financial resources than the complainant; in addition, it will be the OVS operator who has nearly exclusive access to documents that would prove whether the rates charged for access are in fact reasonable. It would be grossly unfair to place this burden on the weaker complaining party, where the majority (if not all) of the information necessary to resolve the claim will usually be readily available only from the OVS operator.

10. Sports Exclusivity, Network Non-Duplication and Syndicated Exclusivity. In order to preserve the rights of broadcast stations, including LPTV stations, that have paid to acquire these exclusive rights to certain programming, the Commission should unconditionally apply these existing broadcast rules to OVS.

11. Information Provided to Subscribers. Consistent with Section 653(b)(1)(E)(iv) of the 1996 Act, the Commission should adopt a rule that prohibits an OVS operator from omitting television broadcast stations or other unaffiliated programming services carried on the system from any navigational device, guide or menu. Otherwise, the OVS operator may improperly bias the subscribers in favor of its own affiliated programming.

12. Must-Carry and Retransmission Consent. In order to preserve over-the-air local broadcast stations, whether commercial or educational, full or low power, both must-carry and retransmission consent should apply to OVS. However, because OVS will likely cover much greater areas (i.e., more than one Area of Dominant Influence ("ADI")) than current cable

systems do, the rules as applied to OVS may wish to limit any broadcast station's must-carry rights to its Grade B contour.

13. Bundling Packages of Programming. The Commission correctly recognizes that the bundling of individual programming services may in some instances provide subscribers with lower cost and more convenient choices. Thus, OVS operators should be allowed to bundle such services where they deem appropriate. However, all programming services offered by an OVS operator should be available to consumers on an unbundled basis at a reasonable and competitive rate, and such unbundled services should be marketed in a manner and frequency comparable to those services which are bundled by the operator. In other words, a subscriber should have the same opportunity to know about and receive an unbundled service as it does a bundled one, and should not be penalized for choosing the unbundled option.

Respectfully submitted,

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